



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 13, 2010

Ms. Josie L. Ramirez
Assistant District Attorney
Hidalgo County District Attorney
100 North Closner, Room 303
Edinburg, Texas 78539

OR2010-13853

Dear Ms. Ramirez:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 393234.

The Hidalgo County District Attorney's Office (the "district attorney") received a request for all information, including judicial and jail records, pertaining to two named individuals and statistical data from August 1, 2007 to the present showing the total number of individuals: (1) reviewed, processed, or adjudicated on charges of truancy and failure to attend; (2) referred directly to a court by each school district for truancy and failure to attend; and (3) whose charges of truancy and failure to attend cases were transferred. You state the district attorney does not maintain the requested jail records.¹ You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.108, 552.111, and 552.114 of the Government Code and privileged under rule 192.5 of the Texas Rules of Civil Procedure. We have considered your arguments and reviewed the submitted information.

¹The Act does not require a governmental body to release information that did not exist when a request for information was received, create responsive information, or obtain information not held by or on behalf of governmental body in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

Initially, we address your assertion that any judicial records are not subject to the Act. The Act applies to information that is "collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business by a governmental body." Gov't Code § 552.002(a)(1). However, a "governmental body" under the Act "does not include the judiciary." *Id.* § 552.003(1)(B). Information that is "collected, assembled or maintained by . . . the judiciary" is not subject to the Act but is instead "governed by rules adopted by the Supreme Court of Texas or by other applicable laws and rules." *Id.* § 552.0035(a); *cf.* Open Records Decision No. 131 (1976) (applying statutory predecessor to judiciary exclusion under section 552.003(1)(B) prior to enactment of section 552.0035). We note you have only submitted communications to the district attorney, arrest sheets, plea sheets, and adjudication sheets compiled by the district attorney for its internal use in a criminal prosecution. You do not claim any of this information is held by the district attorney on behalf of the judiciary. Thus, we find you failed to demonstrate the district attorney maintains any of the submitted information on behalf of the judiciary. Therefore, we conclude the submitted information is subject to the Act and must be released unless it falls within an exception to public disclosure.

We also note you did not submit any of the requested statistical data for our review. We assume, to the extent any additional information responsive to the instant request existed when the district attorney received the request for information, you have released it to the requestor. If not, then you must do so at this time. *See* Gov't Code §§ 552.301(a), .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes no exceptions apply to requested information, it must release information as soon as possible).

Next, we note the district attorney did not fully comply with section 552.301 of the Government Code. Subsection (b) of section 552.301 requires a governmental body requesting an open records ruling from this office to "ask for the attorney general's decision and state the exceptions that apply within a reasonable time but not later than the tenth business-day after the date of receiving the written request." Gov't Code § 552.301(b). While the district attorney raised sections 552.101, 552.107, 552.108, 552.111, and 552.114 of the Government Code and rule 192.5 of the Texas Rules of Civil Procedure within the ten-business-day time period as required by subsection 552.301(b), the district attorney did not raise section 552.103 of the Government Code until after the ten-business-day deadline.

Generally, if a governmental body fails to timely raise an exception, that exception is waived. *See generally id.* § 552.302; Open Records Decision No. 663 at 5 (1999) (untimely request for decision resulted in waiver of discretionary exceptions). Section 552.103 is a discretionary exception to disclosure which protects a governmental body's interests and may be waived. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision No. 551 (1990) (statutory predecessor to section 552.103 serves only to

protect governmental body's position in litigation and does not itself make information confidential); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, the district attorney may not withhold any of the submitted information under section 552.103.

You assert Exhibits E and F contain student records, which are protected pursuant to section 552.114 of the Government Code. Section 552.114 excepts from disclosure student records "at an educational institution funded wholly or partly by state revenue." Gov't Code § 552.114(a). This office applies the same analysis under section 552.114 and the federal Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code. *See* Open Records Decision No. 539 (1990). FERPA governs the availability of student records held by educational institutions or agencies receiving federal funds. FERPA applies only to student records in the custody of educational institutions and to records directly transferred from the educational institution to the third party. 34 C.F.R. § 99.33(a)(2). As such, FERPA is not applicable to law enforcement records maintained by a school district's police department that were created for a law enforcement purpose. *See* 20 U.S.C. § 1232g(a)(4)(B)(ii); 34 C.F.R. §§ 99.3, .8. Although you claim Exhibits E and F contain student records, Exhibits E and F are law enforcement records in the custody of the district attorney forwarded to the district attorney by a law enforcement agency. Therefore, we find section 552.114 and FERPA are inapplicable to Exhibits E and F.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses information other statutes make confidential, such as section 58.007 of the Family Code. Juvenile law enforcement records relating to conduct that occurred on or after September 1, 1997, are confidential under section 58.007. For purposes of section 58.007(c), "child" means a person who is ten years of age or older and under seventeen years of age. *See* Fam. Code § 51.02(2). Section 58.007 provides in pertinent part as follows:

(c) Except as provided by Subsection (d), law enforcement records and files concerning a child and information stored, by electronic means or otherwise, concerning the child from which a record or file could be generated may not be disclosed to the public and shall be:

- (1) if maintained on paper or microfilm, kept separate from adult files and records;
- (2) if maintained electronically in the same computer system as records or files relating to adults, be accessible under controls that are separate and distinct from controls to access electronic data concerning adults; and

(3) maintained on a local basis only and not sent to a central state or federal depository, except as provided by Subchapters B, D, and E.

...

(e) Law enforcement records and files concerning a child may be inspected or copied by a juvenile justice agency as that term is defined by Section 58.101, a criminal justice agency as that term is defined by Section 411.082, Government Code, the child, and the child's parent or guardian.

...

(j) Before a child or a child's parent or guardian may inspect or copy a record or file concerning the child under Subsection (e), the custodian of the record or file shall redact:

...

(2) any information that is excepted from required disclosure under [the Act], or other law.

Id. § 58.007(c), (e), (j)(2). Upon review, we find the submitted information pertains to juvenile delinquent conduct and conduct indicating a need for supervision occurring after September 1, 1997. Therefore, the submitted information is subject to section 58.007(c). However, we note the requestor is the representative of the juvenile offenders at issue. Under section 58.007(e), a child has a right to inspect or copy law enforcement records concerning the child. *See id.* § 58.007(e). Accordingly, the district attorney may not withhold the submitted information from this requestor under section 58.007(c). As you raise no other exceptions against disclosure of Exhibits E and F, they must be released to this requestor.² However, section 58.007(j)(2) provides information subject to any other exception to disclosure under the Act or other law must also be redacted. *See id.* § 58.007(j)(2). Because you assert Exhibits C and D are excepted under sections 552.101, 552.107, 552.108, and 552.111 of the Government Code and privileged under rule 192.5 of the Texas Rules of Civil Procedure, we address your arguments for this information. *See id.*

Section 552.108 of the Government Code provides in part:

²Because this requestor has a special right of access to the information being released, the district attorney should again seek our decision if it receives another request for this information from another requestor. *See* Gov't Code §§ 552.301, .302.

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from [required public disclosure] if:

...

(4) it is information that:

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or

(B) represents the mental impressions or legal reasoning of an attorney representing the state.

Gov't Code § 552.108(a)(4). A governmental body must reasonably explain how and why section 552.108 is applicable to the information at issue. *See id.* § 552.301(e)(1)(A). In *Curry v. Walker*, 873 S.W.2d 379 (Tex. 1994), the Texas Supreme Court held a request for a district attorney's "entire litigation file" was "too broad" and, quoting *National Union Fire Insurance Co. v. Valdez*, 863 S.W.2d 458 (Tex. 1993, orig. proceeding), held that "the decision as to what to include in [the file] necessarily reveals the attorney's thought processes concerning the prosecution or defense of the case." *Curry*, 873 S.W.2d at 380. The present request seeks all information in the district attorney's file pertaining to two named individuals. We understand you to contend the instant request is for the entire prosecution files involving the two named individuals. You assert release of Exhibits C and D would reveal the mental impressions or legal reasoning of prosecutors in the district attorney's office. Based on your representations and our review, we conclude the district attorney may withhold Exhibits C and D under section 552.108(a)(4).³

In summary, the district attorney may withhold Exhibits C and D under section 552.108(a)(4) of the Government Code. The remaining information must be released.

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php,

³As our ruling is dispositive, we do not address your remaining arguments against disclosure of Exhibits C and D.

or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in dark ink, appearing to read 'Ana Carolina Vieira', with a stylized flourish at the end.

Ana Carolina Vieira
Assistant Attorney General
Open Records Division

ACV/eeg

Ref: ID# 393234

Enc. Submitted documents

c: Requestor
(w/o enclosures)